

### **STEP THREE: ASSESS ADVERSE EFFECTS**

Once the eligibility of all properties in the APE has been resolved agencies must assess the effect of the proposed project on any Historic Properties not completely avoided. However, the range of alternatives the agency should first consider, and document in an Effect Finding as having considered, and then eliminated include:

- 1) Moving the undertaking to another site,
- 2) Using an alternative project design,
- 3) designing a new undertaking,
- 4) canceling the undertaking.

The earlier in the planning process that these options are considered with an informed awareness of possible effects to important cultural resources, the more likely reasonable alternatives can be designed. Once the agency has considered and rejected these options, the agency moves to consider the effects of the project on Historic Properties.

*For Federal Undertakings* reviewed under Section 106, the 2001 revised 36CFR800 regulations combined previous “effect criteria” and “adverse effect criteria” (36 CFR 800.5(a)(1)). Current regulations require federal agencies to assess possible adverse affects any time it finds Historic Properties may be affected or when the SHPO/THPO/ACHP objects to an Agency’s No Properties Affected finding (800.4(d)(2)). However a proposed rule change may modify this requirement. See Federal Register vol. 68, No. 186, 55354-55358. In making an effect finding the agency should notify all consulting parties. As with eligibility determinations, the Federal regulations require Effect

Findings to be done by the agency in consultation with the SHPO (THPO and/or the ACHP), Indian Tribes, and after consideration of consulting and interested parties’ and public viewpoints.

*For State Heritage Properties* reviewed under the State Antiquities Act, Effect findings, mitigation or treatment plans for State Heritage properties are, like significance determinations, reviewed by the SHPO, but decision-making authority and documentation of justification rests with the state agency. Appeals to effect findings may be submitted under 22-3-429-(5)-(7) MCA. The following discussion regarding the criteria and assessment of adverse effects apply primarily to federal undertakings under Section 106. In principal, however, the considerations are the same under state law. The biggest difference is that there is no consultation or involvement of the ACHP in state-only actions and undertakings – the criteria are the same.

#### Criteria of Adverse Effect

The Criteria of Adverse Effect read in part: *An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association....Adverse Effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative (36 CFR 800.5(a)(1).*

Effects then are not constrained by administrative boundaries, ownership or

discretionary action. Effects can be direct or indirect. Direct effects occur at the time and place of the action. Indirect effects are removed in time or location, but still reasonably foreseeable. Changes need not be negative to be Effects. The action must only alter the characteristics making the property Eligible in order to result in Effects. Potential effects must be considered Effects under Section 106.

As part of an Effect Finding, it is the responsibility of the agency to obtain and consider the views of interested persons, tribes, CLGs (all those identified during the information and evaluation steps), as well as, others who have notified the agency of their interest. Any participant may request ACHP advice, guidance and assistance including the resolution of disagreements regarding effects (36 CFR 800.2(b)(2)).

#### Adverse Effect Finding

According to regulation, Adverse Effects on historic properties include, but are not limited to (36 CFR 800.5(a)(2)):

1) Physical destruction, damage, or alteration of all or part of the property, including rehabilitation, repair, hazardous material remediation, provision of handicapped access or any other alteration not consistent with the Secretary's Standards for the treatment of Historic Properties (36 CFR 68);

2) Removal of a property from its historic location:

3) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;

4) Introduction of visual, audible,

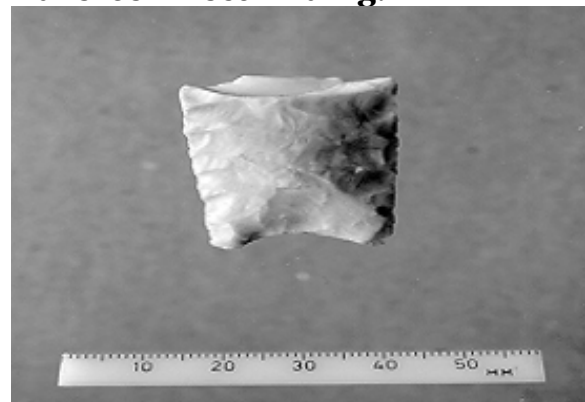
or atmospheric elements that are out of character with the property or alter its setting;

5) Neglect of a property resulting in its deterioration or destruction; and

6) Transfer, lease, or sale of property without legally enforceable preservation restrictions or conditions.

#### No Adverse Effect Finding

The agency may propose that it has modified or conditioned an undertaking such that any effects on Historic Properties could be found to be Not Adverse. Two major examples include 1) when the undertaking is limited to rehabilitation of structures and the work conforms with the Secretary of the Interior 's Standards, or 2) when the undertaking is limited to the sale, transfer, or lease of a federal historic property, and conditions are included to ensure preservation of the historic qualities of the property (36 CFR 800.5(b)). Unlike previous regulations, under the current 36 CFR 800 regulations **data recovery at archaeological sites no longer meets the criteria for a No Adverse Effect finding.**



Agencies have two ways of reaching a finding of No Adverse Effect. The most common procedure is to seek and obtain

the concurrence of the SHPO and consulting parties. Alternatively, the agency may submit full documentation directly to the ACHP. The necessary No Adverse Effect documentation is described at 36 CFR 800.11(e)). This documentation will include explicit description of any conditions or stipulations necessary to be considered a No Adverse Effect and the views of consulting parties and the public. It should include the actual details of actions proposed, such the window repairs for rehabilitation of a building, or the language of preservation easements for a land exchange. These conditions are often referred to as "mitigation", although mitigation more properly encompasses only actions to *lessen* Adverse Effects. The ACHP will provide additional guidance in applying the criteria of Adverse Effects as part of No Adverse Effect findings in the future.

For the purposes of these Guidelines we do not need to specifically distinguish between conditions made for a No Adverse Effect finding and mitigation of an Adverse Effect finding. We do, however, point out that No Adverse Effect conditions must directly and completely preserve the significant qualities and integrity of eligible properties, while Adverse Effect mitigation may be considerably broader, as described below in Step Four.

#### Consultation/Resolution of No Adverse Effect Findings

Although not required, the Montana SHPO may recommend use of a two party

Memorandum of Agreement (MOA) in some No Adverse Effect situations. Examples include when there are multiple properties involved, numerous or complex

stipulations, stipulations which may take some time to complete (particularly when the stipulation will not be completed before the agency approves a project), or when multiple parties are involved with differing responsibilities. However, a MOA may not be required particularly if the ACHP is reviewing the finding under §800.5(c)(3). MOAs are generally not required in the 36 CFR 800 regulations for No Adverse Effects and if SHPO requests such an agreement in order to concur in a No Adverse Effect, the agency may decide to request ACHP review as an alternative.

If the SHPO does not respond to a request for review and concurrence in a No Adverse Effect finding within 30 days, the agency may assume concurrence. Other consulting and interested parties also have 30 days to review and possibly object to agency findings. The ACHP may at the request of those parties, or on its own initiative, also review those findings.

In cases where the SHPO and agency cannot reach agreement on a No Adverse Effect finding or on acceptable preservation conditions, the agency must then submit their views with documentation (§800.11(e)) to the ACHP after notifying the SHPO. The ACHP may concur, concur with new conditions, or object, leading to formal ACHP consultation regarding an Adverse Effect. However, if the ACHP does not respond in 15 days, the agency may assume ACHP concurrence in an agency's No Adverse Effect finding.

#### National Historic Landmarks

Section 110(f) of the NHPA requires that Federal agencies exercise a higher standard of care when considering possible adverse effects to National Historic Landmarks (16 U.S.C. 470a-2).

Under 36 CFR 800.6 and 800.10, federal agencies are required, in addition to consulting with SHPO, to:

- Notify the ACHP if any undertaking may adversely affect an NHL and invite participation,
- Notify the Secretary of the Interior and invite participation,
- Consider the findings of the Interior and the ACHP if the ACHP has asked for a formal report from the Interior,
- Advise all interested parties of possible adverse effects with complete background, alternatives and action taken to advance a preservation outcome,
- Similarly notify the public, and
- Inform the public of the outcome and include provisions of resulting MOA, PA or ACHP comment. (see [www.achp.gov/regs-nhlplain](http://www.achp.gov/regs-nhlplain))

